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In the Supreme Court of the United States

OCTOBER TERM, 1979

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

PACIFIC LEGAL FOUNDATION, JOHN B. KILROY, THE CITY OF TORRANCE, AND THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The court of appeals held that, under Section 402(a) of the Clean Water Act, 33 U.S.C. 1342(a), EPA may not issue, deny, or extend an NPDES permit without first holding an adjudicatory hearing complying with 5 U.S.C. 554-556 and 557 and that EPA must hold such hearings even where, as here, no request for such a hearing presenting a material issue of fact is submitted to the agency (Pet. App. 16a-19a). The only exception to this sweeping rule arises where EPA can demonstrate on judicial review that its action is based on facts about which no plausible dispute exists so that an adjudicatory hearing would have served "absolutely no purpose" (*id.* at 19a-20a).

This holding invalidated EPA's regulations *sub silentio* inasmuch as those regulations call for denial of an "adjudicatory" hearing unless a requestor makes a threshold showing that there are material factual issues

to be adjudicated. 40 C.F.R. 125.36(b); Pet. Br. 3-4. In our view, however, the agency correctly construed the statutory "opportunity" for a hearing, which Section 402(a) provides, as not requiring that a hearing be held prior to every NPDES action taken by EPA. Rather, we submit, the agency may condition the availability of the hearing upon a request, *National Independent Coal Operators' Association* v. *Kleppe*, 423 U.S. 388, 397-398 (1976), and may impose a threshold requirement that a material issue of fact be tendered for resolution in a timely manner. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973).

1. Respondent PLF and Kilroy ("PLF") argue that EPA erred in not conducting at least a public, legislative-type hearing. Thus, PLF argues that " 'significant public interest' existed in this particular permitting action" (PLF Br. 24), that EPA itself knew its action was "controversi[al]" (*ibid.*), that EPA's newspaper announcement was insufficient notice to the public (*id.* at 26-28), that EPA violated its regulations requiring a public, legislative-type hearing where there is " 'significant public interest' " (*id.* at 3-4, 23), that EPA failed to provide the public with " 'a genuine opportunity to speak on the issue of protection of its waters' " as called for by the legislative history (*id.* at 20), and that all the court of appeals really felt was missing was a record justifying the decision of the Administrator not to hold a public, legislative-type hearing (*id.* at 38). The short and dispositive answer to all of these arguments is that, although EPA did not conduct a public, legislative-type hearing, the court below set aside EPA's action—not for failure to hold a public, legislative-type hearing—but for

failure to hold an adjudicatory hearing.[1] Any error in failing to conduct a public, legislative-type hearing cannot justify the court of appeals' vacation of EPA's action for failure to hold an adjudicatory hearing.[2]

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[1]If PLF desired review of the failure of the court of appeals to order EPA to hold a public hearing, it should have filed a cross-petition for certiorari. Its failure to do so bars its attempts to raise the issue now. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226 n. 2 (1975); *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 431 (1941).

[2]In any event, EPA did not err in not holding a public, legislative-type hearing. Such a hearing had already been held in 1975 (A. 6) where the public, including all respondents, had ample opportunity to be heard. A public hearing was also held on the January 24, 1977 extension (A. 94). Notice was published and given to the City of the permit extension (A. 113-120, 126), yet no request for a public, legislative-type hearing was made. Moreover, the so-called "sludge-out" requirement, to which PLF objects, is a statutory imperative. It could not have been deleted no matter how vehemently it might have been attacked at a public hearing (see pages 6-7, *infra*). In these circumstances, it was not unreasonable to conclude that there was insufficient public interest in the permit extension to justify a further public, legislative-type hearing. 40 C.F.R. 125.34.

To be sure, the Regional Administrator stated in separate litigation brought by PLF that EPA would voluntarily prepare an environmental impact statement concerning EPA's decision to provide financial assistance to the City's Interim Sludge Disposal Project in light of the "controversy" that had arisen over that project (A. 108-111). That controversy, though related to the sludge-out requirement in the permit, is a separate matter. As required by the Section 301(b)(1)(B), 33 U.S.C 1311(b)(1)(B), and the pertinent effluent limitations, the permit merely prohibits the discharge into the ocean of sludge after certain dates (A. 12, 18). The permit does not dictate any particular alternative method for disposal of the sludge. In its Interim Sludge Disposal Project, the City chose to dispose of the sludge in a landfill until a more permanent solution is made operational (A. 5, 109). That choice was opposed by PLF, Kilroy and others on the theory that it would "involve transporting millions of tons of sludge through the streets of Los Angeles in huge trucks for disposal in landfills near residential neighborhoods" (PLF Br. 6). The "controversy" referred to by the Regional Administrator in his affidavit in the separate litigation (A. 111) concerned only the particular method of sludge disposal selected by the City. PLF itself recognizes this distinction (see A. 133).

2. Neither PLF nor Los Angeles defends the sweeping holding below that requires, except in extraordinary circumstances, automatic adjudicatory hearings before all EPA denials, issuances or extensions of NPDES permits. Neither respondent directly challenges our basic point that an adjudicatory hearing may be conditioned on filing a request presenting material issues of fact. Both, however, advance narrower arguments that, on the facts of this case, a remand for an adjudicatory hearing was proper.

a. PLF contends (Br. 10, 14, 31) that EPA did not provide PLF with prompt and sufficient notice of its proposed and final action and, therefore, PLF's failure to frame a material factual issue should be excused. There are, however, several flaws in that argument. First, PLF in fact filed a request for a hearing on its objections to EPA's action which was treated as timely by EPA (A. 159-163). Well before it filed the request, PLF was intimately familiar with the NPDES permit, its sludge-out schedule, the City's Interim Sludge Disposal Project, and its alleged environmental and social consequences (A. 84-88, 131-147). When PLF filed its hearing request, it knew the sludge-out schedule had been carried forward without change (A. 160). Therefore, nothing prevented PLF, when it filed its request, from framing any factual issue it desired concerning "the adverse impacts on people, fish, and wildlife" which PLF says are "certain to result" from the implementation of the sludge-out schedule (PLF Br. 6).

Second, the record makes its abundantly clear that PLF intentionally chose to present only legal objections to the extension of the permit. In its brief to EPA's General Counsel, PLF stated (A. 173-174; emphasis added):

> The issues of law certified to the General Counsel by the Environmental Protection Agency (EPA) Regional Administrator of Region IX are not an accurate reflection of the issues which would have been raised at the adjudicatory hearing requested pursuant to 40 C.F.R. § 125.36. *Requestor of the adjudicatory hearing, John B. Kilroy, proposed to raise two basic issues*:
>
> 1. Whether there is authority under either the applicable statutes or regulations to extend the expiration date of an existing National Pollutant Discharge Elimination System (NPDES) permit, or whether the action taken by EPA with regard to Permit No. CA0109991 was the issuance of a new permit; and
>
> 2. Whether EPA should require that a permittee go forward with a project contained in an NPDES compliance schedule when that project is being studied in an environmental impact statement (EIS) pursuant to the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4332, *et seq.*, and Federal Water Pollution Control Act (FWPCA, 33 U.S.C. §§ 1281, *et seq.*).

These are legal, not factual, issues. The Regional Administrator's letter to PLF had advised that EPA had concluded that "the request does not set forth material issues of fact * * * [but] does * * * present issues of law * * *" (A. 166). If PLF truly believed the certification of issues was in error because it omitted factual issues, PLF

would have said so in its brief to General Counsel. Instead, PLF confirmed that it posed only legal objections to the extension of the permit. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553-554 (1978).[3]

Third, even now PLF tenders no material factual issue requiring an adjudicatory hearing. PLF states (Br. 6) that the purpose of any hearing should be "to present to EPA, on a public record, information and arguments relating to adverse impacts on people, fish, and wildlife which are certain to result from the implementation of EPA requirements for modifying the processing of wastewater at Hyperion." PLF wishes to demonstrate "significant adverse environmental and social effects" of

[3]For the same reasons, PLF's argument is not improved by its claim (Br. 31 n.13) that EPA violated 40 C.F.R. 125.35(b)(1) by not sending PLF a copy of the June 2, 1977, order extending the permit. In any event, PLF misconstrues Section 125.35(b)(1). That provision only requires that EPA send copies of permits to persons who comment on proposed pending permits or extensions. PLF's letter of December 30, 1976 (A. 84-88), was not a comment on the proposed extension from June 30, 1977, to December 17, 1979. Rather, it was a request that EPA suspend the sludge-out schedule altogether and allow sludge discharge except insofar as the marine environment was demonstrably harmed. This letter was evidently intended as a comment on a federal funding of the City's Interim Sludge Disposal Project (see A. 63-83)). But even if it was intended as a comment on EPA's then-pending proposal to extend the permit, Section 125.35(b)(1), at most, required EPA to send to PLF a copy of the January 1977 order extending the permit through June 30, 1977 (A. 96-101). PLF does not contend that it failed to receive a copy of that order. PLF's contention that the January 1977 order was merely an interim order and that the June 1977 order was the "final action" on the extension pending when PLF wrote its letter ignores the fact that after the January order, EPA issued in April 1977 a new notice of proposed action extending the permit, which EPA regarded as a fresh proposal. In any event, PLF knew when it filed its request for a hearing that the compliance schedule had not been altered. For the reasons set forth in the text, PLF was thus not prejudiced by any failure to receive the June 1977 order.

the use of landfills to dispose of sludge (Br. at 7). However, even if PLF had made a timely request for an adjudicatory hearing on such matters, it would have properly been denied as not material. The permit did not dictate or even address the alternatives available to the City for the disposal of sludge. The City chose (in its Interim Sludge Disposal Project) to dispose of the sludge at a landfill pending a more permanent solution. Although the City might have selected a different interim solution with different consequences, the alternative of continuing to discharge sludge into the ocean was and is barred by Section 301(b)(1)(B) and the regulations thereunder.

As explained by the Regional Administrator to PLF (A.89-91), Section 301(b)(1)(B) then absolutely required (and still requires) all publicly-owned treatment works to meet "effluent limitations based upon secondary treatment" set by the Administrator no later than July 1, 1977. Those limitations prohibit the discharge of sludge (except in minimal amounts). See, *e.g.*., 40 C.F.R. 133.102.[4] Therefore, even if the sludge-out schedule, by requiring the City to find an alternative method of disposal, indirectly imposes countervailing environmental and social consequences, those consequences are inadmissible as a matter of law in an NPDES proceeding, for EPA has already determined (in Section 301 limitations

[4]The limitations do not expressly refer to sludge but to its component parts. Sludge is the solid residue left over after primary and secondary treatment (A. 3-4, 12, 137).

issued in 1973 no longer to timely challenge) that such discharges must be stopped.[5]

b. The City of Los Angeles (Br. 13-16) contends that EPA failed to provide it with sufficient notice that the sludge-out schedule EPA intended to carry forward was the EPA schedule rather than the state schedule. Had the notice to the City specified the sludge-out schedule at issue, the City contends it "may very well have" requested a hearing (*id.* at 17). The City, however, does not contend it actually believed that the NPDES permit would be governed by the state's more generous timetable.

In any event, the City had no basis for such a belief. The City knew or should have known that an NPDES permit was required for each outfall and that EPA had exclusive jurisdiction under the Act to issue NPDES

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[5]To be sure, EPA's sludge-out schedule, in realistic recognition that Los Angeles would be unable to comply with these effluent limitations by July 1, 1977, and, in an effort to bring about as prompt compliance as possible, provided a schedule that extended to April 1978. Insofar as the permit purported to authorize noncompliance after July 1, 1977, the permit was unauthorized. At the time of the Regional Administrator's action, EPA had not yet fashioned a policy for dealing with permits to facilities which would be unable to comply with the statutory deadline. Since the 1975 permit was issued, EPA has adopted a policy of not issuing permits authorizing noncomplying discharges after the statutory deadline. In some cases, however, EPA will advise a discharger unable to meet the deadline that EPA does not intend to bring an enforcement action so long as the discharger adheres to a fixed compliance schedule. See generally *Bethlehem Steel Corp.* v. *Train*, 544 F. 2d 657 (3d Cir. 1976); cf. Sections 301(i) and 309(a)(3)(B) of the Clean Water Act, 33 U.S.C. (Supp. I) 1311(i) and 1319(a)(3)(B); *A Legislative History of the Clean Water Act of 1977*, 95th Cong., 2d Sess. 861-862 (Comm. Print 1978). In any event, this discrepancy does not improve PLF's argument, for PLF would eliminate the sludge-out requirement altogether (see A. 88).

permits for the five- and seven-mile outfalls, as the court of appeals held (Pet. App. 14a-16a). Although the State purports to regulate all three outfalls under its Porter-Cologne Act (see *id.* at 15a), any state compliance schedule under local law could not have affected the requirements of the NPDES permit.[6] No modification of the sludge-out schedule in EPA's 1975 permit could have been made without providing advance notice to Los Angeles and the public that such a modification was proposed. The City points to no EPA notice proposing at any time to modify the federal sludge-out schedule in the 1975 permit. In any event, the City still offers no material factual issue it wishes to have resolved at any evidentiary hearing.[7]

3. The Ninth Circuit based its holding in part on a "strong policy in favor of holding [formal] public hearings before an adjudicative decision is made" (Pet. App. 20a), and its view that a Section 402 hearing must in all cases conform to the trial-type procedures of 5 U.S.C. 554, 556 and 557. This was error. A Section 402

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[6]The obvious reason that EPA did not veto the State's permits for the five-and seven-mile outfalls is that these permits were not NPDES permits but were issued only under California's Porter-Cologne Act. A state-administered NPDES program may displace federal jurisdiction only for navigable waters within three miles of the coastline (see Pet. App. 14a-16a). Thus, although the state properly issued an NPDES permit for the one-mile outfall (through which sludge is not pumped (see A. 4)), the State's permits for the five-and seven-mile outfalls were purely local permits not subject to federal veto.

[7]The state modification permits relied on by the City, moreover, did not purport to modify the federal permit (A-51, 56, 61, 105-107, 155-156). To the contrary, orders 75-165 and 77-84 recognized that EPA would have to modify the NPDES permit (A. 51, 154). The joint actions distinguish between the state and federal permits and do not purport to modify the federal sludge-out schedule (A. 93-95).

hearing need not in all cases be an adjudicatory hearing. Even where an adjudicatory hearing is indicated, moreover, it is not an "on-the-record" hearing and is thus not governed by 5 U.S.C. 554, 556 and 557. Instead, EPA may provide an adjudicatory hearing or a public, legislative-type hearing, depending on the circumstances, and may do so without regard to the APA. See our opening brief at 29-35.[8]

Although Congress could have instructed the agency to follow 5 U.S.C. 554, 556 and 557, we think the better view of the legislative history is that it did not. Congress omitted the phrase "on the record." The weight of the legislative history demonstrates that Congress did not intend to impose the requirements of 5 U.S.C. 554, 556 and 557 in those instances where EPA permits an adjudicatory hearing. PLF stresses three contrary arguments.

First, PLF contends (Br. 34-35) that where judicial review specifically provided by statute, as here, can only be effective on an administrative record, it must be presumed that Congress intended Sections 554, 556 and 557 to apply. There is no such presumption however. *Califano* v. *Yamasaki*, No. 77-1511 (June 20, 1979), establishes no such presumption and hardly held that the only fair procedure for administrative adjudications is 5 U.S.C. 554, 556 and 557. Indeed, *Yamasaki* does not even mention those provisions. *Yamasaki* illustrates our point that fair adjudicatory procedures can be tailored to the needs of the agency and litigants without following the specific formal procedures of the APA. Moreover,

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[8]Indeed, EPA's procedures place primary reliance on the less formal notice-and-comment procedures and, where significant public interest exists, an informal public hearing. Only for the rare factual issue that remains after these procedures is a trial-type hearing available.

EPA's adjudicatory procedure provides a record sufficient for judicial review. Where it does not, the complete remedy is a remand to the agency for a more complete record. *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

Second, PLF contends that the statutory goal of public participation in NPDES proceedings can best be achieved by requiring APA-type adjudicatory hearings in all instances. EPA's flexible hearing regulations, however, will achieve far greater public participation than would PLF's scheme. By its nature, an adjudicatory hearing meeting the requirements of 5 U.S.C. 554, 556, and 557 is a closed process, not an open one.[9] The "general public" can hardly afford to pay counsel which are necessary to participate in evidentiary proceedings. Because of the trial-like nature of adjudicatory hearings, a member of the public wishing to present views must become a party to formal proceedings, must attend prehearing conferences, and must agree to submit to cross-examination before an administrative law judge in order to have his views considered. This is hardly a "wide open means for communicating with the public at large" (PLF Br.22).[10] In contrast, EPA's provision of a public, legislative-type hearing (where there is sufficient public interest in a proposed action) is far more suited to encouraging public participation.

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[9]Thus, Professor Davis distinguishes a statute requiring a "hearing" from those requiring a "public hearing" by pointing out that the latter, "when many are affected, usually means a speech-making hearing rather than a hearing with a determination on the record." 2 K. Davis, *Administrative Law Treatise* § 12:7, at 434 (2d ed. 1979).

[10]Where the threshold requirements of an adjudicatory hearing are met under EPA's regulations, the type of hearing provided fully complies with 5 U.S.C. 554, 556 and 557. No court has held to the contrary. Nonetheless, our primary submission on this issue is that Section 402 proceedings are not "on-the-record" proceedings for purposes of the APA.

Finally, PLF challenges our use of the legislative history of Section 311(b)(6), 33 U.S.C. 1321(b)(6). As we noted (Pet. Br. 31-32 n.20), the committee stated that the phrase "notice and opportunity for a hearing" was "not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record * * *." *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 804 (Comm. Print 1973). PLF contends that the committee nevertheless indicated its intent to impose adjudicatory hearings in the third sentence, which noted that "[p]rovisions of title 5 of the United States Code commonly referred to as the Administrative Procedure Act, as amended, will nevertheless apply to assure due process and protection of a respondent's right." *Ibid.* PLF omits from its quotation the fourth sentence in the paragraph, which explains what provisions of Title 5 were referred to: "In that regard, the respondent has the opportunity of a de novo hearing in any collection proceeding initiated by a United States Attorney after the conclusion of administrative procedures." *Id.* at 804-805. This language indicates that even if Congress though formal hearings were appropriate under Section 311(b)(6), it intended the forum for those hearings to be de novo review in the district court (see 5 U.S.C. 706(2)(F)), and likewise intended the agency hearings to be informal.[11]

[11]The entire paragraph reads as follows (Leg. Hist. 804-805):

> The language "notice and opportunity for a hearing" of Section 311(b)(6) is not intended to impose in every instance the complex procedural requirements associated with formal adjudicatory hearings on the record before a hearing examiner such as are used for ratemaking and similar federal rule issuance. The committee believes that effective administrative enforcement will be enhanced by assessment procedures which are expeditious. Provisions of title 5 of the United States Code commonly referred to as the Administrative Procedure Act, as amended, will nevertheless apply to assure due process and protection of a respondent's rights. In that regard, the respondent has the opportunity of a de novo hearing in any collection proceeding initiated by a United States Attorney after the conclusion of administrative procedures. The net result is to parallel the penalty assessment method which the Coast Guard has used in the past in connection with laws which it administers.

The Committee may also have meant to refer to 5 U.S.C. 555(e) and 558(c). See Pet. Br. 31-32 n.20.

CONCLUSION

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

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